broad and general as indeed they must be to enable him to perform the duties of his office and protect the public in relation to the activities and operations of insurance companies.

Throughout the complaint it is clear that the principal on the bond executed by petitioner is charged with misconduct in connection with the performance of the duties of his office. It is alleged that the Insurance Commissioner of Georgia and the Insurance Commissioner of Florida conspired together to use the powers of their respective public offices to suppress, eliminate and destroy the business of the plaintiff. The complaint proceeding only against his surety alleges in great detail acts charged to the Insurance Commissioner of Georgia, either separately or in conspiracy with other Insurance Commissioners. Thus the petition must seek to recover against the petitioner on account of acts done by Cravey in his official capacity. Otherwise, as will be seen, no case is stated at all against petitioner.

Public officials discharging their public duties, even though acting maliciously, are not liable in damages on account of such official action. The rule is based upon considerations of public policy. The underlying reason is that pointed out by the Supreme Court of the United States in **Spalding v. Vilas**, 161 U. S. 483, 40 L. ed. 780:

> "In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time be the subject of inquiry in a civil suit for damages."

The Court of Appeals for the Fifth Circuit, in **DeBusk v. Harbin**, 212 F. 2d 143, affirmed the dismissal of an action for damages for alleged malicious treatment received

from federal officials, which resulted in the plaintiff losing his job, and said:

> "Stripped of its immaterial and superfluous allegations, the petition merely alleges, in effect, that appellant's discharge caused him to suffer actionable damage because it was improperly motivated. However, as the trial court notes (footnote 1, supra) the legal sufficiency of the claim for damages does not properly hinge upon any subjective inquiry into appellee's intent in causing appellant's dismissal, but is based upon objective considerations of a public policy designed to protect public officials from undue harassment by civil litigation for acts committed by law to their control or supervision, and within the scope of their duties and authority. See Gregoire v. Biddle, supra, 177 F. 2d at page 581; Waterman v. Nelson, supra; Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135, 140, 1942, 118 A. L. R. 1440."

There can be no liability on the part of a surety company unless there is liability on the part of the principal on the bond.

> "The rule of law which governs the liability of sureties upon bonds generally is that the surety is not liable unless the principal is, and, therefore, may plead any defense available to the principal."
>
> Phelps v. Dawson, 97 F. 2d 389 (8th Ct.).

If there can be no recovery against the Comptroller General of Georgia, who is not a party to this case, and as has been seen, there can be no such recovery, there can, of course, be no recovery as against the surety on his official bond.

However, if it is contended that there could be a recovery against the Comptroller General of Georgia because his acts were **not** committed under color of his office, with the

result that he does not possess the immunity from suit which the courts have uniformly said exists to protect a public officer, then it necessarily follows that the conduct complained of was **not** done under color of his office, with the result that there is no liability against the surety on his bond.

In **Culpepper v. U. S. Fidelity & Guaranty Co.**, 199 Ga. 56, 33 S. E. 2d 168, the Supreme Court of Georgia held:

> "A cause of action against a deputy sheriff when sued on his official bond, together with his surety thereon, is shown only if the harmful act was done by virtue of or under color of office. No liability thereon attaches for personal malfeasance of the officer, although done when en route to serve a jury summons."

Malone v. Howell, 192 Sou. 224, is a decision of the Supreme Court of Florida to the same effect.

The Supreme Court of Georgia in the Georgia case cited, and the Supreme Court of Florida in the Florida case cited, cite many other cases to the same effect.

The application of the rule of immunity of public officials is not avoided by allegations that the defendants are sued in their personal capacity.

Laughlin v. Rosenman, 163 F. 2d 843.

It is thus seen that if the Comptroller General of Georgia was acting in his official capacity, he is protected by the immunity rule, and the surety on his bond is not liable. If he was not acting in his official capacity, but was acting outside of the scope of his duties, then his surety is not liable or responsible for his acts. In either event there is no right here to recover against the petitioner.

The judgment of the District Court sustaining petitioner's motion for summary judgment was correct.

PRAYER.

It is respectfully prayed that a writ of certiorari issue from this Court to the Court of Appeals for the Fifth Circuit and that the decision of that Court be reversed and the judgment of the District Court be reinstated.

Respectfully submitted,

.....

M. F. GOLDSTEIN,

.....

B. D. MURPHY,

.....

ROBERT E. COLL,

Attorneys for Petitioner
Hartford Accident and Indemnity
Company.

1130 Citizens and Southern
National Bank Building,
Atlanta 3, Georgia.